

1 MICHAEL J. SHEPARD (SBN 91281)

2 *mshepard@kslaw.com*

3 **KING & SPALDING LLP**

4 50 California Street, Suite 3300

5 San Francisco, California 94111

6 Telephone: +1 415 318 1221

7 KERRIE C. DENT (admitted *pro hac vice*)

8 *kdent@kslaw.com*

9 **KING & SPALDING LLP**

10 1700 Pennsylvania Avenue, NW, Suite 900

11 Washington, DC 20006-4707

12 Telephone: +1 202 626 2394

13 CINDY A. DIAMOND (SBN 124995)

14 *cindy@cadiamond.com*

15 **ATTORNEY AT LAW**

16 58 West Portal Ave #350

17 San Francisco, CA 94127

18 Telephone: +1 408 981 6307

19 Attorneys for Defendant

20 ROWLAND MARCUS ANDRADE

21 **UNITED STATES DISTRICT COURT**

22 **NORTHERN DISTRICT OF CALIFORNIA**

23 **SAN FRANCISCO DIVISION**

24 UNITED STATES OF AMERICA

25 Case No. 3:20-cr-00249-RS

26 Plaintiff,

27 **DEFENDANT ROWLAND MARCUS ANDRADE'S
SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF EX PARTE MOTION TO COMPEL
GOVERNMENT TO DISCLOSE ATTORNEY
INFORMATION AND TO REFRAIN FROM
RETURNING ALEXANDER LEVIN'S DEVICES
UNTIL SUBPOENA IS SERVED**

28 v.

ROWLAND MARCUS ANDRADE,

Defendant.

Judge: Hon. Laurel Beeler, Magistrate Judge
Hearing: December 14, 2023, 9:30 am

1 Events since the filing of Mr. Andrade's November 9, 2023 motion to compel the
 2 government to disclose attorney information and to refrain from returning Alexander Levin's
 3 devices until a subpoena is served (ECF #239) require this brief update, which underscores the
 4 urgency of Mr. Andrade's request for relief. For the Court's convenience, this Supplemental
 5 Memorandum briefly recites the history of Mr. Andrade's request for Mr. Levin's devices, the
 6 Court's April 7, 2023 ruling on that request, and the government's response to the Court's Order;
 7 followed by a November 2, 2023 hearing (ECF #234) and this Court's Order of November 5,
 8 2023 summarizing its November 2 ruling. ECF #235. It then briefly reports the events since Mr.
 9 Andrade's last filing on November 9, 2023 that show the need for this Supplemental
 10 Memorandum in support of his Motion. The new events further support Mr. Andrade's pending
 11 Motion, for which a hearing is scheduled on December 14, 2023.

12 I. THE HISTORY OF THE COURT'S PREVIOUS ORDERS

13 On November 28, 2022, Mr. Andrade filed a Motion to Compel seeking, among other
 14 things, Mr. Levin's iPhone and iPad. ECF #120. Following two rounds of briefing and two
 15 arguments, this Court ruled on April 7, 2023, that the government must produce Alexander
 16 Levin's devices. ECF #165. The government did not respond by producing the devices, but
 17 rather waited six weeks and then produced four spreadsheets of "extractions"¹ from Mr. Levin's
 18 phone, making an argument – not made in any of the briefs or arguments before the Court's
 19 ruling – that it did not lawfully possess the entire phone. *See Declaration of Kerrie C. Dent in*
20 Support of Status Report ("Dent Decl."), ¶ 2.

21 Mr. Andrade sought relief from this Court. Part of his argument offered alternatives if
 22 the Court permitted the government to make its belated lawful possession argument. One of those
 23

24
 25
 26 ¹ Many of the messages described on the spreadsheets were redacted without explanation and others referenced
 27 attachments that were neither visible on the spreadsheets nor accessible through links.

1 alternatives was that “if Mr. Levin or his counsel is within this Court’s subpoena power, then the
 2 government should return what it says it does not lawfully possess to Mr. Levin’s counsel, with
 3 advance notice to and cooperation with Mr. Andrade, so that Mr. Andrade can serve a subpoena
 4 for it on Mr. Levin or his counsel before the phone is returned.” ECF #215, at 5:5-8. On
 5 November 2, 2023, following a hearing, the Court ruled that the government should provide an
 6 update no later than November 9 on whether the devices have been returned to Levin and, if not,
 7 whether it objects to doing so. Dkt. ##234 and 235.

8 After the hearing, Mr. Andrade’s lawyers emailed the government and requested that the
 9 government inform them as soon as it learns whether the SDNY or FBI still has Levin’s devices,
 10 and, if so, whether they plan to return anything to Levin. Mr. Andrade’s counsel asked that, in
 11 the event the government has any devices and will return them, then it should notify Mr.
 12 Andrade’s counsel in advance of when, to whom, and where any device was going to be returned
 13 to permit time to serve a subpoena for the returned device(s). The government did not
 14 respond. Dent Decl. at ¶ 3.

15 Responding to the Court’s November 2, 2023 Order, on November 9, 2023, the
 16 government reported to the Court that (1) more than a year ago prosecutors in the Southern
 17 District of New York had asked Levin’s counsel where counsel wanted Levin’s devices to be
 18 sent, but Levin’s counsel never responded and (2) in November 2023, Levin’s counsel asked the
 19 FBI to mail Levin’s devices to defense counsel’s office, “which FBI-New York has done or
 20 intends to do shortly.” Dkt. #237. Like the government’s failure to respond to Mr. Andrade’s
 21 request after the November 2, 2023 hearing, the government’s November 9 response to the Court
 22 did not address Mr. Andrade’s proposal that the government return the phone “with advance
 23 notice to and [in] cooperation with Mr. Andrade, so that Mr. Andrade can serve a subpoena for it
 24 on Mr. Levin or his counsel before the phone is returned.” Dent Decl. at ¶ 4. Mr. Andrade
 25 therefore filed a motion asking the Court to compel the government to identify Levin’s counsel

1 and to refrain from returning Mr. Levin's devices until a subpoena is served.² Dkt. # 239. The
 2 motion was filed ex parte, for immediate consideration, and a hearing has been scheduled for
 3 December 14, 2023.

4 II. EVENTS SINCE MR. ANDRADE'S FILING ON NOVEMBER 9

5 On November 22, 2023, the government emailed Mr. Andrade's counsel the name and
 6 address of a lawyer in New York City, who, it said, was representing Levin. Although Mr.
 7 Andrade's counsel reached out to the lawyer immediately and asked him if he would accept
 8 service of a subpoena for Levin's devices, he responded that he was "not sure" what the matter
 9 was about and that, because it was the day before Thanksgiving, he wanted to wait until the
 10 following week to have a call. Dent Decl. at ¶ 5. Accordingly, Mr. Andrade's counsel emailed
 11 the prosecutors on November 22, 2023 to remind them of Mr. Andrade's November 2 request
 12 that Levin's devices not be returned to Levin or Levin's counsel without an opportunity for Mr.
 13 Andrade to serve a subpoena for the devices. Again, the government did not respond. Dent
 14 Decl. at ¶ 6.

15 A week later, on November 29, the lawyer whose name and information was provided by
 16 the government emailed Mr. Andrade's counsel and stated that he does not represent Levin and
 17 does not have Levin's devices. Mr. Andrade's counsel promptly reminded the government for a
 18 third time that it should not return Levin's iPad and iPhone to Levin or his counsel until Mr.
 19 Andrade has had an opportunity to serve a subpoena for the devices. Again, the government did
 20 not respond. Dent Decl. at ¶ 7.

21
 22
 23
 24
 25 ² Also on November 9, 2023, Mr. Andrade's counsel filed a letter to Judge Beeler requesting clarification on four
 aspects of the Court's November 5 Order to ensure that any appeals to Judge Seeborg are timely made. ECF #238.
 26 On November 14, 2023, the Court clarified that the November 5, 2023 discovery order (ECF #235) was preliminary
 and that the Court would consider additional filings shortly. ECF #241.

III. ARGUMENT

Given the response of the lawyer the government identified, and the lack of any cooperation or response from the government to Mr. Andrade's three requests, Mr. Andrade is left without a clue as to whether the devices have been returned, and without anyone to serve if they have been or soon will be returned. There is a risk that the government has returned or will return the devices in a way that does or did not allow Mr. Andrade to serve a subpoena for the devices on Mr. Levin or his counsel before they are returned and that, as a result, the devices – which this Court has already held to be material to the preparation of Mr. Andrade's defense – will be lost or destroyed. This is the urgency that requires this Court's intervention and supports Mr. Andrade's motion for an Order requiring the government to provide correct contact information for Levin's attorney and to refrain from returning Levin's devices to either Levin or his counsel until Mr. Andrade has had a reasonable amount of time to serve a subpoena for Levin's devices.

Respectfully submitted,

DATED: December 3, 2023

KING & SPALDING LLP

By: /s/ Michael J. Shepard
MICHAEL J. SHEPARD
KERRIE C. DENT
CINDY A. DIAMOND

Attorneys for Defendant
ROWLAND MARCUS ANDRADE